Filed 6/27/19 P. v. Omar CA1/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. ABDOL ALI OMAR, Defendant and Appellant.	A151707 (Alameda County Super. Ct. No. C178286) ORDER MODIFYING OPINION NO CHANGE IN JUDGMENT

THE COURT:

It is ordered that the opinion filed on June 26, 2019, be modified as follows:

At page three, in the second full paragraph, commencing with "As the police and witnesses," replace the last sentence of that paragraph with the following sentence:

> Throughout the entire time Roberto M. observed defendant, defendant was "neutral" and "flat," without emotional variance.

There is no change in the judgment.

Date:_____ _____P.J.

Filed 6/26/19 P. v. Omar CA1/3 (unmodified opinion)

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. ABDOL ALI OMAR, Defendant and Appellant.	A151707 (Alameda County Super. Ct. No. C178286)

Defendant Abdol Ali Omar appeals from judgment, following jury verdict, of first-degree murder (Pen. Code, § 187 [1]) plus a true finding on a sentence enhancement allegation of use of a deadly weapon during the commission of the murder (§ 12022, subd. (b)(1)). He was sentenced to an aggregate term of 26 years to life in state prison, consisting of 25 years to life on the murder conviction and a consecutive term of one year on the deadly weapon enhancement allegation.

Defendant contends he is entitled to a new trial based on errors by his own counsel and the trial court. He alleges his trial counsel was ineffective for (1) failing to present expert testimony, and (2) failing to object to admission of a video taken from a police officer's body camera depicting the officer performing CPR on the dying victim and mentioning the video in closing argument. He argues the court committed two instructional errors: (1) not sua sponte advising the jury on an implied malice theory as part of the instructions on second-degree murder and voluntary manslaughter, and (2)

[1] All further unspecified statutory references are to the Penal Code.

erroneously instructing the jury that they had to agree unanimously on the degree of murder. Lastly, he argues the cumulative effect of the described errors deprived him of due process, a fair trial, and the proper consideration of his diminished capacity defense. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

The charges filed against defendant arose from a November 30, 2014 incident at a convenience store owned by defendant's relative. On the day of the killing, defendant, armed with a knife, went to the store where he saw the victim R.P. [2] (hereinafter referred to as the victim). After they spoke for a while, the victim walked away. When she returned, defendant started to punch her and then drew his knife and stabbed her in her chest, fatally wounding her; the victim also sustained lesser wounds to her breast and abdomen, along with several cuts and abrasions identified as defensive wounds.

A. The People's Case

The People's witnesses testified concerning the circumstances of the relationship between the defendant and the victim, the incident that led to the victim's death, and the aftermath of the killing.

Before the killing, defendant and the victim had been in a "volatile" relationship for about a year. Defendant and the victim had been arguing a lot and the victim had talked about ending the relationship several times. While defendant "could be jealous," they apparently had a "good relationship." They had argued a day or two before the murder, but it was believed they were still together the day of the killing.

On the day of the killing, the victim, defendant's relative, and the victim's mother were in the convenience store. Defendant's relative and the victim's mother had been dating since 2006 and defendant's relative had helped raise the victim. Surveillance cameras captured the events and videos (no audio) were played for the jury. Defendant walked up to the victim at the back of the store and they appeared to speak. No one

---

[2] Pursuant to the California Rules of Court rule 8.90(b)(4)(10), governing "Privacy in Opinions," we refer to the victim by her initials and certain witnesses by their first name and last initial.

overheard what was said. The victim walked outside for a moment and, when she returned, defendant started to punch her. He stabbed the victim in her upper chest area. The victim also sustained less serious stab wounds in her breast and abdomen, along with several cuts and abrasions, identified as defensive wounds. After defendant stabbed the victim, defendant's relative and the victim's mother grabbed the knife and threw it to the side. Defendant's relative "was shocked" that defendant had stabbed the victim, because "[t]his [is] not him, you know."

After being stabbed, the victim ran out of the store and collapsed on the street. When two police officers arrived, they found her in the backseat of a van. The victim was bleeding from her mouth, nose, and a large wound on her upper chest area; she was not breathing. One police officer administered CPR for two to three minutes while the officer's body camera recorded the attempt to resuscitate the victim. The victim was later pronounced dead at the scene. The cause of death was the stab wound to her chest that pierced her lung.

As the police and witnesses were tending to the victim, defendant waited outside the convenience store. Roberto M.,[3] who lived above the store, called 911. He was helping the victim when he heard another man pointing at defendant and yelling, "[t]here's the dude that did it." Roberto M. saw defendant standing approximately five feet away on the sidewalk, looking at the victim. Roberto M. thought it was odd that defendant was just standing there "focused" on the victim. At some point, the man walked over to defendant and grabbed him. Defendant "just kind of stood there super still" and did not say anything. At some point, Roberto M. saw defendant walk 20 feet down the street and pull out his cell phone. Defendant then walked back to where he had been standing. Defendant was not angry or crying, had "no expression," and showed "no emotion." Throughout the entire time R.M. observed defendant, defendant was "neutral" and "flat," without emotional variance.

---

[3] *Ante*, fn. 2.

As one police officer was giving CPR to the victim, several people approached another officer and pointed out defendant as the person who stabbed the victim. Defendant, with his hands out, palms up and close together, as if requesting to be handcuffed, approached the other officer. After noticing blood on defendant's hands, the officer handcuffed defendant and placed him in the back of the patrol car. The jury heard conflicting evidence concerning what defendant said as he approached the officer. Ethel D.[4] testified that defendant said, "I'm a murderer. I murdered her." The officer's personal recording device recorded defendant stating, "I did that. I'm the one who did it." The recording was played for the jury.

The police recovered defendant's cell phone. The call log and text messages taken from the phone were admitted into evidence. During the two-hour period before the killing, there were text exchanges between defendant and the victim and one telephone call between them that last approximately five minutes. Defendant's text messages included "declarations of love" and pleas to work things out, as well as text messages that "[p]ay back is coming hard," the victim should change her mind before it is "too late," and that defendant "will make all go away soon. You will go with me. No one will have you."

B. Defense Case

Defendant testified on his behalf concerning the circumstances of his relationship with the victim, the incident that led to the victim's death, and the aftermath of the killing.

Before the killing, the victim's mother had proposed an arranged marriage between the then 31-year-old defendant and 15-year-old victim. By that time defendant had known the victim for several years, the victim had dated six or seven older men, and defendant was separated from his wife who lived in Yemen. Defendant and the victim developed a friendship and he thought they were committed to marriage. Defendant took care of the victim and "gave her everything." He took the victim to school, they went on

---

[4] *Ante*, fn. 2.

vacations together, he sent her to Laos with her mother, and he bought her expensive gifts (a car) and jewelry (an engagement ring).

When the victim turned 18, they went to a mosque and were married in a religious ceremony. The relationship became intimate after the victim turned 18. The marriage was not "legally recognized," but they planned to legally marry the month after the killing. Defendant did not invite any family members to the mosque ceremony because the victim's mother had requested a $20,000 dowry and he did not yet have the money to pay it. Defendant claimed that, while he was faithful to the victim, the victim was not faithful to him. Defendant described three occasions when he caught the victim being unfaithful. After the second incident, they reconciled with the victim apologizing and assuring him that she loved him.

On Monday, November 24, a month before the planned marriage, defendant received a call and was told about a social media posting in which the victim was seen kissing a man. By this time, defendant was referring to the victim as his wife, and his family and friends considered the couple married. The defense introduced photos of the victim kissing a man, who referred to the victim as his wife. After seeing the victim with another man, defendant was "devastated" and angry, and he called the victim to confront her. At first, the victim denied she had been with another man, and she stated she still planned to marry defendant. When defendant sent the photograph to the victim, she hung up on him. Defendant was so upset that he closed his store early, and he went to the convenience store to inform his relative and the victim's mother that the victim was cheating on him. Defendant's relative assured defendant he would talk to the victim's mother and they would "figure this out." Defendant went home "very sick;" he was "mentally sick" and "hurt." Defendant tried to contact the victim, but she blocked his texts and telephone calls.

On Tuesday, November 25, the victim went to the convenience store and dropped off the keys to the car defendant had bought her, defendant's debit card, defendant's insulin, and jewelry, including the engagement ring. The victim told defendant's relative to tell defendant that she did not want anything more to do with defendant. Defendant

talked to the victim and asked her why she was ending the relationship. The victim said "this time it's for good. I want to be alone[.] I don't want to be bothered by anyone." Defendant tried to get the victim to tell him how long she had been cheating on him, but she denied being unfaithful.

Defendant and the victim next spoke on Thursday, November 27. Defendant again closed his store early and went to the victim's home, where she was asleep in bed. Defendant told her he loved her, still wanted to marry her, and asked her to be honest with him. The victim said, "it was just pictures," and she and defendant ended up kissing and "in bed together." Defendant took a shower, and when he came back the victim was on the telephone talking to someone. The victim told him to leave and that he was not welcome in her home anymore. She said, "I still don't want to be with you." Defendant then drove to the convenience store and informed the victim's mother that the victim was cheating on him. Defendant was "very stressed out" and "out of [his] mind," and he did not know what to think. Defendant loved the victim "more than anything in the world" and "always forgave her." Defendant was afraid that this time it might be different because the victim had openly called herself the wife of another man on social media. This made defendant believe that the victim did not care if he found out that she was cheating on him.

Defendant did not talk to the victim again until the evening of Saturday, November 29, when the victim accepted his telephone call. Defendant offered to bring her lottery tickets and her favorite food. The victim told him she would be asleep, and he should come to the convenience store the next day. Defendant went to the victim's home, with flowers, food, and lottery tickets. When he arrived, the victim's brother said the victim was with her sister in another city. Defendant's calls to the victim went unanswered. Defendant then drove around looking for the victim before returning to the victim's home. Defendant saw a car pull up and the victim get out. The victim approached the driver's side window and "passionately" kissed the man's mouth. The man was the same person defendant had seen in the social media photograph. Defendant first "froze," and then he screamed at the victim, who ran to her apartment and locked

herself inside. Defendant yelled outside the victim's home for 15 minutes, finally leaving after the neighbors started yelling at him. When defendant got home, he cried for an hour. His night-long texts and telephone calls to the victim went unanswered.

Defendant testified concerning the texts and telephone calls he made to the victim on Sunday, November 30, the day of the killing. After seeing the victim with another man, defendant changed the victim's contact listing from "my baby" to "ho [sic]." The victim answered one telephone call, which lasted one minute and 46 seconds. When defendant said he had seen the victim cheating and wanted to know how long she had been cheating, the victim replied, "It's none of your f******* business, leave me the f*** alone." The victim then hung up, leaving defendant "angry and hurt." Defendant further indicated that he had deleted some text messages because they were "old." He had written that he loved her and forgave her. He acknowledged that some of the texts sounded threatening, but he claimed they were not intended to be so; he just meant that no one was going to take his place because they loved each other, what she had done was just sex, and they would get back together.

Less than an hour before the killing, defendant called the victim and they spoke for five minutes. Defendant again asked her to tell him about the other man. The victim said she had met the other man on social media, they had been dating for a year, they were engaged to be married, her family knew about him, and she no longer planned to marry defendant. The victim had wanted to break up with him sooner, but felt sorry for him. After he hung up, defendant started to cry. He went to his kitchen and picked up a knife. He believed his life was over.

After placing the knife in his jacket pocket, defendant called his brother and asked to be taken to the convenience store. At that point, defendant wanted to hurt the victim and himself because he thought that was the only way they could be together. He thought he could fix the situation because she would "fear" him; she would be "scared;" and she would not cheat on him or leave him. He had "run out of options;" he had "nothing else;" he had "begged her, cried and did everything" he could, but she would not accept him. He conceded that his thoughts and actions made no sense: "It was crazy and

stupid." At the time, however, it had "made a lot of sense . . . on that particular day," but not "now and after that." Before the killing, he was very sick, shaky, and pale, he threw up, and he had not taken his insulin or slept for four days.

Defendant's brother dropped defendant off a few blocks from the convenience store so that defendant could "clear his head." When defendant arrived at the store, he kept the knife in his pocket because he wanted the victim to take him back. The victim was behind the counter and defendant's "crazy fantasy" about hurting the victim and himself "vanished." Instead, he wanted to talk to her, wanted her back, and did not want to hurt her. He tapped her on the shoulder and asked her to move so he could get by her. He asked her to lie to him and say that the other man did not touch her last night. The victim replied, "Yes, he did. It's none of your f******* business bitch, die." She grabbed the garbage and walked out. Defendant felt "sick" and grabbed a bottle of water because he could not breathe. He was planning on walking outside, but when the victim came back and walked towards him he "exploded," pulled out the knife, and stabbed her. Defendant claimed that at that time nothing was going through his head, he did not know what he was doing, he was "mad and angry and hurt." While he sobbed on the witness stand, defendant admitted he killed the victim, but he could not say why. After seeing the surveillance video of the killing in the courtroom, defendant stated he felt like he had seen a monster, it was not the person that he was, it was out of character, and it was not him "on that video." He denied he had ever hurt the victim before, and he had never physically struck a woman.

On cross-examination, defendant testified he "did not remember" stabbing the victim, and he did not feel the knife go into her body. He recalled his brother yelling that defendant had stabbed the victim, but could not remember doing so because he was "confused and shaky" and "in shock." After the stabbing, defendant pulled out his telephone to call 911, but heard sirens and called his brother instead. Defendant told his brother that he had "hurt" the victim. Defendant denied saying at the scene that he had "murdered" the victim. Defendant thought he had only injured the victim and did not learn that she died until later at the police station. He denied that he had killed the victim

on purpose, he knew the act of stabbing someone with a knife in the chest was likely to kill the person, and he repeated that he only wanted to hurt her. Following multiple questions, defendant repeatedly said he did not intend to kill the victim.

DISCUSSION

I. Purported Ineffectiveness of Trial Counsel

Defendant claims he is entitled to a new trial as his trial counsel: (1) did not present expert testimony; and (2) did not object to the admission of a video taken from the police officer's body camera depicting the officer's performance of CPR on the dying victim (hereinafter referred to as the CPR video) and trial counsel's mention of the CPR video during his closing remarks. We conclude counsel's purported deficient conduct does not require reversal.

a. Applicable Law

The law governing defendant's claim of ineffective assistance of counsel is well settled. "A criminal defendant is guaranteed the right to the assistance of counsel by both the state and federal Constitutions. (U.S. Const., 6th Amend.; Cal. Const., art. I, § 15.) 'Construed in light of its purpose, the right entitles the defendant not to some bare assistance but rather to *effective* assistance.' [Citation.] In order to demonstrate ineffective assistance of counsel, a defendant must first show counsel's performance was 'deficient' because his 'representation fell below an objective standard of reasonableness . . . under prevailing professional norms.' [Citations.] Second, he must also show prejudice flowing from counsel's performance or lack thereof. [Citation.] Prejudice is shown when there is a 'reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.' [Citations.]" (*People v. Wharton* (1991) 53 Cal.3d 522, 575; see *Strickland v. Washington* (1984) 466 U.S. 668, 687–688, 691–692, 694 (*Strickland*).) "If the defendant makes an insufficient showing on either one of these components, the ineffective assistance claim fails." (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1126; see *Strickland*, *supra*, 466 U.S. at p. 697 ["there is no reason for a court deciding an ineffective assistance claim to

approach the inquiry in the same order [set forth above] or even to address both components of the inquiry if the defendant makes an insufficient showing on one"].)

b. Trial Counsel's Failure to Call Expert Witness

Defendant's claim of ineffective assistance based on counsel's failure to present expert testimony is readily resolved. Defendant contends his trial counsel was aware that defendant suffered from physical and mental health conditions, and yet failed to proffer expert testimony to explain how those conditions impacted defendant's mental state at the time of the killing. However, "in the absence of affirmatively showing that counsel acquiesced through ignorance of the facts or the law" in his decision not to call an expert witness, defendant is "not entitled to relief." (*People v. Jenkins* (1975) 13 Cal.3d 749, 755.) " 'Ordinarily the tactical decisions of trial counsel will not be reviewed with the hindsight of an appellate court. The decisions which counsel must make . . . will necessarily depend in part upon what he then knows about the case, including what his own client has told him. There may be considerations not shown by the record which could never to communicated to the reviewing court as a basis for [counsel's] decision. Thus, [our] inability to understand way counsel did as he did cannot be a basis for inferring that he was wrong.' [Citations]." (*Ibid.*)

We conclude this case is "the usual one" in which the record does not shed light on why trial counsel opted not to present expert testimony. (*People v. Weaver* (2001) 26 Cal.4th 876, 926.) " 'When . . . the record sheds no light on why counsel acted or failed to act in the manner challenged, the reviewing court should not speculate as to counsel's reasons. . . .' " (*People v. Lucero* (2000) 23 Cal.4th 692, 728–729.) " 'To engage in such speculations would involve [us] . . . " 'in the perilous process of second-guessing.' " ' " (*People v. Pope* (1979) 23 Cal.3d 412, 426, overruled on another ground in *People v. Berryman* (1993) 6 Cal.4th 1048, 1081, fn. 10.) Accordingly, defendant's claim of ineffective assistance based on counsel's failure to present expert testimony fails. The cases cited by defendant are factually distinguishable and do not require a different outcome.

c. Trial Counsel's Failure to Object to Admission of CPR Video and His Mention of the CPR Video During Closing Argument

As part of the prosecution's case in chief, the trial court admitted into evidence, without objection, a video taken from a police officer's body camera depicting the officer's performing CPR on the dying victim (CPR video). In his opening brief, defendant describes the CPR video as "a two minute, 25 second video from [the officer's] body camera providing a first-person view of him giving CPR to the dying [victim]. [The officer] can be heard urging [the victim] to breathe and to 'stay with me, stay with me, stay with me.' " Defendant concedes he has forfeited any claim of error because his trial counsel failed to object to the admission of the evidence. He therefore seeks relief based on his trial counsel's purportedly "deficient performance" in both failing to object to the admission of the CPR video and trial counsel's mention of the CPR video in his closing argument, which defendant contends was sufficiently prejudicial "to undermine confidence in the outcome of the trial" under *Strickland.* We see no merit to defendant's contentions.

The legal principles governing the exclusion of evidence are well-settled. "Evidence Code section 352 gives the trial court discretion to 'exclude evidence if its probative value is substantially outweighed by the probability that its admission will . . . create substantial danger of undue prejudice . . . .' " (*People v. Thomas* (2012) 53 Cal.4th 771, 806 (*Thomas*).) "A trial court's exercise of discretion under section 352 will be upheld on appeal unless the court abused its discretion, that is, unless it exercised its discretion in an arbitrary, capricious, or patently absurd manner. [Citations.]" (*Thomas, supra,* at p. 806.)

Defendant contends trial counsel was deficient for failing to object to the CPR video because the trial court would have certainly sustained the objection on the grounds the video was irrelevant and unduly prejudicial. However, " '[a]s a rule, the prosecution in a criminal case involving charges of murder or other violent crimes is entitled to present evidence of the circumstances attending them even if it is grim.' [Citation.]" (*Thomas, supra,* 53 Cal.4th at p. 806.) It is well settled that graphic evidence in a murder

trial is not "rendered 'irrelevant or inadmissible simply because [it may] duplicate testimony, depict uncontested facts, or trigger an offer to stipulate.' [Citation.]" (*Thomas*, *supra*, at p. 806; see *People v. Milan* (1973) 9 Cal.3d 185, 193–194 [court found no abuse of discretion in the admission of four photographs, two of which were in color, three of which showed deceased's bloodstained body slumped down in the cab, and a fourth which showed deceased's head with blood around his ear and face, despite defendant's claims that the photographs were admitted solely to inflame the jury, were gruesome and lacked probative value, the parties had stipulated as to the cause of death, and the defense presented was diminished capacity].) Contrary to defendant's contention, "[t]o the extent [the CPR video] used to illustrate the [police officer's] testimony may have been duplicative of testimony, it nevertheless had some value in helping the jury to understand the testimony or in corroborating the observations of witnesses." (*Thomas*, *supra*, at p. 807.) Thus, we cannot agree with defendant that trial counsel could have successfully objected to the CPR video on the ground it was not relevant.

We also see no merit to defendant's argument that trial counsel could have successfully objected to the CPR video on the ground it was unduly prejudicial. Our Supreme Court has " 'described the "prejudice" referred to in Evidence Code section 352 as characterizing evidence that uniquely tends to evoke an emotional bias against a party as an individual, while having only slight probative value with regard to the issues.' [Citation.]" (*Thomas*, *supra*, 53 Cal.4th at p. 807.) The CPR video, while extremely short, was undoubtedly gruesome, but defendant points to no evidence in the record that would support a finding that its admission "distract[ed] the jury from its proper function." (*Ibid*.) As our Supreme Court has " 'observed, victim photographs and other graphic items of evidence in murder cases always are disturbing.' [Citation.] Nevertheless, absent evidence to the contrary, we may assume that the jurors were able to ' "face [their] duty calmly and undismayed." ' [Citation.]" (*Ibid*.)

In sum, even if an objection had been made at trial to the admission of the CPR video, the trial court would not have abused its discretion in admitting the evidence. The

video's admission did not violate Evidence Code section 352 or deny defendant his constitutional right to a fair trial. "A motion to exclude such evidence under Evidence Code section 352 would surely have failed. [Defendant's trial] counsel did not perform deficiently for failing to make what would have been a meritless request." (*People v. Ochoa* (1998) 19 Cal.4th 353, 432.)

We are similarly not persuaded by defendant's claim that the prejudice arising from the admission of the CPR video was compounded by his trial counsel's mention of the video in his closing argument. Defense counsel argued to the jury that the key issue was defendant's mental state at the time he committed the killing. In resolving that key issue, defense counsel urged the jurors "to keep in mind as you head into deliberation in this case, important things. [¶] One of the things in this trial that struck me . . . it evoked a strong emotional response was watching the [CPR] video of [the police officer]. This was the first-person perspective of him performing CPR on [the victim]. And there's something about that first-person perspective that I think really brings the viewer, myself, you the jury, really into that moment. And it impressed upon me the difficulty that first responders have in their jobs. The difficulty being that they have a job to do, and it is emotionally charged, and there are a million distractions surrounding them and they are required to perform this almost super-human feat of ignoring the emotional moment and just doing their job. [¶] I would submit to you, ladies and gentlemen, that that is what a jury is also required to do. Because if this was a question of how emotionally charged, how outrageous this case is, I would have nothing to say to you frankly. That's not the law. That is not our system. The role of the jury, the job of the jury is to first ascertain what the facts, what has been proven beyond a reasonable doubt, what hasn't, and of those facts how much weight are we going to give to that evidence. And then the job of the jury is to apply the law that [the trial court] will give to you to the facts as you find them. [¶] So again, the central issue in the case is one of mental state. . . . It's not a question of what he did, it's why he did it. What was his intention? What was going on in his head at that moment?"

Defendant contends his trial counsel's remarks regarding the CPR video were made to "ensure[ ] that the disturbing video would have a devastating and lasting effect on [the] jurors." We cannot agree. When the remarks are read in context, they would have had just the opposite effect. Trial counsel urged that, like first responders, the jurors had to set aside and not be swayed by the gruesome nature of the circumstances of the killing and instead perform their duties by evaluating the evidence according to the court's instructions and disregarding their emotional and visceral responses. Moreover, we see nothing in the record, and defendant cites nothing, in support of his further assertion that "[j]urors on the fence between the degree of murder, or as between murder and voluntary manslaughter, would have been swayed by the disturbing and irrelevant video of [the victim's] dying moments." The record shows that during deliberations, which spanned several hours over the course of two days, the jurors made no request to see the CPR video. However, they did ask to view the surveillance tape from the store and requested readbacks of portions of defendant's direct and cross-examination testimony. Thus, to the extent any inferences can be drawn from the record, it appears that the jurors acceded to defense counsel's request that they perform their duty to "dispassionately" evaluate the evidence before reaching their verdict.

We conclude that counsel's failure to object to the admission of the CPR video, and his closing remarks mentioning the video, are not "sufficient to undermine [our] confidence in the outcome" of the trial. (*Strickland*, *supra*, 466 U.S. at p. 694.) Accordingly, defendant's claim of ineffective assistance of counsel on this ground fails.

II. Jury Instructions

Defendant asserts the trial court committed two prejudicial errors when instructing the jury: (1) it failed to instruct sua sponte on the concept of implied malice as a theory of second degree murder and voluntary manslaughter; and (2) it failed to properly instruct the jury on the requirement of reaching unanimous agreement on the degree of murder. We conclude defendant's contentions do not require reversal.

1. Relevant Facts

After closing arguments and using the CALJIC pattern instructions, the court instructed the jurors on murder in the first degree, murder in the second degree, and voluntary manslaughter, as well as general instructions applicable to their deliberations. We set forth the pertinent CALJIC instructions in the order in which the court gave the instructions to the jury:

"CALJIC 3.31

"Concurrence Of Act and Specific Intent

"In the crime charged in Count One, namely murder, there must exist a union or joint operation of act or conduct and a certain specific intent in the mind of the defendant. Unless this specific intent exists, the crime to which it relates is not committed. [¶] The specific intent required is included in the definition of the crime set forth elsewhere in these instructions.

"CALJIC 8.10

"Murder - Defined

"The defendant, Abdol Ali Omar, is accused in Count One of having committed the crime of murder, a violation of Penal Code [s]ection 187. [¶] Every person who unlawfully kills a human being with malice aforethought is guilty of the crime of murder . . . . [¶] In order to prove this crime, each of the following elements must be proved: [¶] 1. A human being was killed; [¶] 2. The killing was unlawful; and [¶] 3. The killing was done with malice aforethought."

"CALJIC 8.11

" 'Malice Aforethought' " – Defined

" 'Malice' may be either express or implied: [¶] Malice is express when there is manifested an intention unlawfully to kill a human being. [¶] Malice is implied when: [¶] 1. The killing resulted from an intentional act, [¶] 2. The natural consequences of the act are dangerous to human life, and [¶] 3. The act was deliberately performed with knowledge of the danger to, and with conscious disregard for, human life. [¶] When it is shown that a killing resulted from the intentional doing of an act with express or implied malice, no other mental state need be shown to establish the mental state of malice aforethought. . . .

"CALJIC 8.20

"Deliberate and Premeditated Murder [2008 Revision]

"All murder which is perpetrated by any kind of willful, deliberate and premeditated killing with express malice aforethought is murder of the first degree. . . . [¶] If you find that the killing was preceded and accompanied by a clear, deliberate intent on the part of the defendant to kill, which was the result of deliberation and

premeditation, so that it must have been formed upon preexisting reflection and not under a sudden heat of passion or other condition precluding the idea of deliberation, it is murder of the first degree. . . .

"CALJIC 8.30

"Unpremeditated Murder Of The Second Degree

"Murder of the second degree is the unlawful killing of a human being with malice aforethought when the perpetrator intended unlawfully to kill a human being but the evidence is insufficient to prove deliberation and premeditation."

"CALJIC 8.70

"Duty Of Jury As to Degree Of Murder

"Murder is classified into two degrees. If you should find the defendant guilty of murder, you must determine and state in your verdict whether you find the murder to be of the first or second degree."

"CALJIC 8.71

"Doubt Whether First Or Second Degree Murder

"If you are convinced beyond a reasonable doubt and unanimously agree that the crime of murder has been committed by the defendant, but you unanimously agree that you have a reasonable doubt whether the murder was of the first or second degree, you must give the defendant the benefit of that doubt and return a verdict fixing the murder as of the second degree."

"CALJIC 8.40 [2004 Revision]

"Voluntary Manslaughter-Defined

"Every person who unlawfully kills another human being without malice aforethought but with an intent to kill, is guilty of voluntary manslaughter in violation of Penal Code Section 192(a). [¶] There is no malice aforethought if the killing occurred upon a sudden quarrel or heat of passion. [¶] In order to prove this crime, each of the following elements must be proved: [¶] 1. A human being was killed; [¶] 2. The killing was unlawful; and [¶] 3. The perpetrator of the killing intended to kill the alleged victim; and [¶] 4. The perpetrator's conduct resulted in the unlawful killing."

"CALJIC 8.42

"Sudden Quarrel Or Heat Of Passion and Provocation Explained

[Spring 2015 Revision]

"To reduce an unlawful killing from murder to manslaughter upon the ground of sudden quarrel or heat of passion, the provocation must be of the character and degree as naturally would excite and arouse the passion, and the assailant must act under the influence of that sudden quarrel or heat of passion. [¶] The heat of passion which will reduce a homicide to manslaughter must be such a passion as naturally would be aroused in the mind of an ordinarily reasonable person in the same circumstances. . . ."

"CALJIC 8.50

"Murder and Manslaughter Distinguished

"The distinction between murder and manslaughter is that murder requires malice while manslaughter does not. [¶] When the act causing the death, though unlawful, is done in the heat of passion or is excited by a sudden quarrel that amounts to adequate provocation, the offense is manslaughter. In that case, even if an intent to kill exists, the law is that malice, which is an essential element of murder, is absent. [¶] To establish that a killing is murder and not manslaughter, the burden is on the People to prove beyond a reasonable doubt each of the elements of murder and that the act which caused the death was not done in the heat of passion or upon a sudden quarrel."

"CALJIC 8.72

"Doubt Whether Murder or Manslaughter

"If you are convinced beyond a reasonable doubt and unanimously agree that the killing was unlawful, but you unanimously agree that you have a reasonable doubt whether the crime is murder or manslaughter, you must give the defendant the benefit of that doubt and find it to be manslaughter rather than murder.

"CALJIC 8.74

"Unanimous Agreement As To Offense – First or Second Degree Murder Or Manslaughter [2009 Revision]

"Before you may return a verdict in this case, you must agree unanimously not only as to whether the defendant is guilty or not guilty, but also, if you find him guilty of an unlawful killing, you must agree unanimously as to whether he is guilty of murder of the first degree or murder of the second degree or voluntary manslaughter. [¶] However, you are not required to agree unanimously on the theory of guilt."

"CALJIC 17.12

"Jury May Return Partial Verdict – Non-Homicide – Express Acquittal – First

"If you are not satisfied beyond a reasonable doubt that a defendant is guilty of the crime in Count One, and you unanimously so find, you may convict him of any lesser crime provided that you are satisfied beyond a reasonable doubt that he is guilty of that crime. [¶] You will provided with guilty and not guilty verdict forms for the crime

charged in Count One, murder, and the lesser crime of that Count. [¶] The crime of voluntary manslaughter is a lesser crime to that charged in Count One. [¶] Thus, you are to determine whether defendant is guilty or not guilty of the crime charged in Count One, or of any lesser crime(s). In doing so, you have discretion to choose the order in which you evaluate each crime and consider the evidence pertaining to it. You may find it to be productive to consider and reach tentative conclusions on all charges and lesser crimes before reaching any final verdict. . . ."

"CALJIC 17.40

"Individual Opinion Required – Duty to Deliberate

"The People and the defendant are entitled to the individual opinion of each juror. [¶] Each of you must consider the evidence for the purpose of reaching a verdict if you can do so. Each of you must decide the case for yourself, but should do so only after discussing the evidence and instructions with the other jurors. [¶] Do not hesitate to change an opinion if you are convinced it is wrong. However, do not decide any question in a particular way because a majority of the jurors, or any of them, favor that decision. [¶] Do not decision any issue in this case by the flip of a coin, or by any other chance determination."

"CALJIC 17.50

"Concluding Instruction

"You shall now retire to the jury deliberation room. . . . [¶] In order to reach a verdict, all twelve jurors must agree to the decision and to any findings you have been instructed to include in your verdicts. As soon as you have agreed upon a verdict, so that when polled each may state truthfully that the verdict or verdicts express his or her vote, have them dated and signed by your foreperson and then return them to this courtroom. Return any unsigned verdict forms."

The jury was given forms to indicate the following verdicts and findings: (1) guilty of murder, with a space for the jury to "fix the degree" at either first or second degree, and a space for the jury to indicate its finding on the weapon enhancement allegation; (2) not guilty of murder; (3) guilty of voluntary manslaughter, "a lesser included offense as charged in Count One of the Information;" and (4) not guilty of voluntary manslaughter. The jury returned the verdict form indicating its decisions that defendant was guilty of murder, fixed the degree at "first degree," and found "true" the weapon enhancement allegation. In response to the court's question directed at all the jurors, regarding whether, as read, the verdict was true and correct, the "jury" replied,

"Yes." Both the prosecutor and defense counsel waived the right to individually poll the jurors.

2. Analysis

a. Instructions on Second-Degree Murder and Voluntary Manslaughter

"It is settled that in criminal cases, even in the absence of a request, the trial court must instruct on the general principles of law relevant to the issues raised by the evidence. [Citations.] The general principles of law governing the case are those principles closely and openly connected with the facts before the court, and which are necessary for the jury's understanding of the case. [Citations.]" (*People v. St. Martin* (1970) 1 Cal.3d 534, 531.)

Here, the trial court instructed the jury, in pertinent part, on (a) the offense of murder – unlawfully killing with malice aforethought (CALJIC No. 8.10); (b) the definitions of express malice – intent to kill, and implied malice – conscious disregard for human life (CALJIC No. 8.11); (c) first degree murder – deliberate and premeditated killing "with express malice aforethought" (CALJIC No. 8.20); (d) second degree unpremeditated murder – an intentional unlawful killing "with malice aforethought but the evidence is insufficient to prove deliberation and premeditation" (CALJIC No. 8.30); and voluntary manslaughter – unlawful killing "without malice aforethought but with an intent to kill" (CALJIC No. 8.40).

Defendant contends that he is entitled to a new trial because the court had a sua sponte duty to instruct the jury on "the implied malice theory of second degree murder" using CALJIC No. 8.31. That instruction would have informed the jury: "Murder of the second degree is also the unlawful killing of a human being when: [¶] 1. The killing resulted from an intentional act, [¶] 2. The natural consequences of the act are dangerous to human life, and [¶] 3. The act was deliberately performed with knowledge of the danger to, and with conscious disregard for, human life. When the killing is the direct result of such an act, it is not necessary to establish that the defendant intended that the act would result in the death of a human being." (CALJIC No. 8.31.) Defendant also notes that when the court instructed the jury on voluntary manslaughter, the court used a

modified version of CALJIC No. 8.40, and omitted language that would have allowed the jury to consider whether he had committed an unlawful killing "without malice aforethought" but with "conscious disregard for human life."

According to defendant, the omissions in the court's instructions were crucial to the jury's consideration of the issue of his intent to kill the victim, which "was very much in dispute. [He] acknowledged that he stabbed [the victim], but repeatedly testified that he intended only to hurt her. If believed, such testimony supported a verdict of implied malice second degree murder. As given, however, the instructions precluded jurors from crediting his defense theory of the case, leaving them with no option but to convict [him] of an intentional killing." In other words, he posits the given instructions "amounted to a directed verdict on the issue of intent, and constituted reversible error."

We do not reach defendant's claim of instructional error or the necessary standard to review for prejudice as, even if the trial court erred in omitting an implied malice theory when instructing the jury on second degree murder and voluntary manslaughter, any error was harmless under any standard of review for prejudice. (*People v. Jackson* (1989) 49 Cal.3d 1170, 1199 (*Jackson*); see *Chapman v. California* (1967) 386 U.S. 18, 24; *People v. Watson* (1956) 46 Cal.2d 818, 836.) Contrary to defendant's arguments, the record does not demonstrate that the issue of his intent to kill the victim was a close one. While defendant testified that he only intended to hurt the victim, it is not disputed that defendant repeatedly struck the victim with great force using a knife and had previously threatened the victim. The evidence was so strong that the jury found defendant had committed an intentional, premeditated, deliberate, first degree murder *with express malice aforethought* (CALJIC No. 8.30), necessarily rejecting his self-serving testimony denying any intent to kill the victim. Accordingly, we conclude defendant's claim of prejudicial instructional error fails. (See *People v. Coddington* (2000) 23 Cal.4th 529, 593[5] [court found omission of complete instructions on implied

[5] *People v. Coddington*, *supra*, 25 Cal.4th 529, was disapproved on another ground in *People v. Knoller* (2007) 41 Cal.4th 139, 155–156, and overruled on another ground in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1067, fn. 13.)

malice second degree murder was harmless error where evidence of intent to kill was overwhelming and, under properly given instructions, the jury found killings were intentional, premeditated, and deliberate, citing to *Jackson*, *supra*, 49 Cal.3d at p. 1199].)

b. Use of CALJIC No. 8.74

Defendant also contends the trial court committed reversible error by instructing the jury using CALJIC No. 8.74, which advised the jurors that they had a duty to "agree unanimously" as to the degree of murder, but they did not have to unanimously agree on the "theory of guilt." He posits that the latter language, regarding the lack of unanimity on the "theory of guilt," may have confused the jurors by allowing them to believe that unanimity was not required in determining the degree of murder. We disagree.

CALJIC No. 8.74 correctly instructs the jury on the applicable law, namely, that "jurors need not unanimously agree on a particular theory of liability in order to reach a unanimous verdict." (*People v. Sattiewhite* (2014) 59 Cal.4th 446, 479; see *People v. Jenkins* (2000) 22 Cal.4th 900, 1024–1025 [" '[n]ot only is there no unanimity requirement as to the theory of guilt, the individual jurors themselves need not choose among the theories, so long as each is convinced of guilt' "].) Defendant complains, however, that "when jurors are presented with a single theory of first degree murder and a single theory of second degree murder," the courts have held that "it is reversible error to instruct jurors with pattern instructions that they need not agree on the 'same theory' of guilt since jurors may confuse that phrase with the degree of murder," citing to *People v. Sanchez* (2013) 221 Cal.App.4th 1012 (*Sanchez*), and *People v. Johnson* (2016) 243 Cal.App.4th 1247 (*Johnson*). The cases cited by defendant are factually distinguishable, and, do not support his claim that the use of CALJIC No. 8.74 in this case was erroneous.

In both *Sanchez*, *supra*, 221 Cal.App.4th 1012, and *Johnson*, *supra*, 243 Cal.App.4th 1247, the trial courts instructed the jurors with former CALCRIM No. 548, which told the jurors they could not find the defendant guilty of murder unless all of the jurors agreed the People had proved the defendant committed murder under at least one theory, and that the jurors did not need to agree on the same theory. (*Sanchez*, *supra*, at p. 1019; *Johnson*, *supra*, at p. 1279, fn. 20.) In finding that CALCRIM No. 548 was

reversible error in those cases, the appellate courts made clear that "the flaw in giving [former] CALCRIM No. 548 was that it suggested to the jury that it need not agree on the *degree* of murder." (*Johnson*, *supra*, at p. 1280; see *Sanchez*, *supra*, at p. 1025 [court's final instruction to the jury "undermined the notion of unanimity as to degree [of murder] by unambiguously stating: 'You do not all need to agree on the same theory' "].) After *Sanchez* was decided in 2013, CALCRIM No. 548 was revised, and the instruction was again revised in February 2016 after *Johnson* was decided. CALCRIM No. 548 (2019 ed.) now advises the jurors, in pertinent part: "You may not find the defendant guilty of murder unless all of you agree that the People have proved that the defendant committed murder under at least one of these theories. You do not need to agree on the same theory [, but you must unanimously agree whether the murder is in the first or second degree]." In this case, the trial court used the language in CALJIC No. 8.74, which makes clear that the jury must "agree unanimously" as to the degree of murder before returning a verdict, regardless of the particular theory relied on by the People. (See also *People v. Rivera* (2019) 7 Cal.5th 306, 326 (*Rivera*) ["CALJIC No. 8.74 explains that there must be unanimous agreement for the jury to convict on first degree murder and clarifies that a jury could not convict [defendant] of the greater charge if there is no such agreement"].)

Unlike in *Sanchez* and *Johnson*, the prosecutor in this case explained to the jurors that they were being presented with only one theory of first degree murder and that the instruction concerning consideration of the "theory of guilt" applied only to their consideration of second-degree murder. As to the jury's consideration of second-degree murder, the prosecutor correctly informed the jurors that they could unanimously find that defendant committed second-degree murder even if some jurors found he had acted with express malice while other jurors found he acted with implied malice. (See *People v. Brown* (1995) 35 Cal.App.4th 708, 715.) "Although the arguments of counsel cannot substitute for correct instructions from the court [citation], the arguments here support our conclusion that the jury was not misled" regarding the unanimity requirement for fixing the degree of murder. (*People v. Rogers* (2006) 39 Cal.4th 826, 869–870.) There is nothing in the record that indicates the jury was confused by CALJIC No. 8.74. When

we review " 'a supposedly ambiguous [i.e., potentially misleading] jury instruction, " 'we inquire "whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way" that violates the Constitution.' " ' (*People v. Welch* (1999) 20 Cal.4th 701, 766.)" (*People v. Ayala* (2000) 24 Cal.4th 243, 289.) Here, the "record gives no indication of a reasonable likelihood that the jury applied the instructions given it in a legally improper manner." (*Id*. at p. 290.) During deliberations, the jury's notes to the court did not request any clarification of the instructions; the notes only requested one exhibit and two readbacks of defendant's testimony.

Defendant further argues that when CALJIC No. 8.74 is considered in the context of the instructions as a whole, there is a reasonable likelihood that the jurors were confused about their duty to agree unanimously as to the degree of murder. According to defendant, the confusion would arise because CALJIC No. 8.74's advisement that the jurors did not need to unanimously agree on a "theory of guilt," was in conflict with the explicit language that they had to agree unanimously as to whether defendant was guilty of first-degree murder or second-degree murder, but there were no other instructions that would have put them on notice of their duty to unanimously agree between first and second degree murder, and, therefore there was only one way for the jurors to reconcile the language in CALJIC No. 8.74: that unanimity was required in deciding between murder or manslaughter, but not between the degrees of murder. We see no merit to defendant's argument, which, as we now explain, is based on the incorrect premise that both CALJIC No. 8.74, as well as other instructions, blurred the distinction between first-degree murder and second-degree murder.

CALJIC No. 8.74 is titled, "Unanimous Agreement As to Offense – First or Second Degree Murder or Manslaughter." (CALJIC No. 8.74.) First, there is nothing in the phrasing of the title from which the jurors would have understood that "murder of any degree is one discrete crime," while "voluntary manslaughter was another," as defendant suggests. Additionally, the text of CALJIC No. 8.74 uses the disjunctive "or" between murder in the first degree and murder in the second degree, as well as voluntary manslaughter. Thus, the jury was explicitly told "you must agree unanimously as to

whether [defendant] is guilty of murder of the first degree **or** murder of the second degree **or** voluntary manslaughter." (Emphasis added.) (See *People v. Mitchell* (June 24, 2019, S147335) __ Cal.5th__, __ [2019 Cal. Lexis 4610 at p. *37] (*Mitchell*) [CALJIC No. 8.74 "makes clear that the jury must unanimously find that the defendant was guilty of murder in the first degree or murder in the second degree or voluntary manslaughter, without preferring any of the options"].)

Second, we see no merit to defendant's contention that the distinction between first degree murder and second degree murder was "blurred" by the court's use of CALJIC No. 17.12, which informed the jurors how to complete the various verdict forms given to them. Use Note to CALJIC No. 17.12 (Spring 2019 ed.) page 1186 points out that the instruction "may be used in any case which charges a crime with different degrees and/or which charges a crime with charged or uncharged lesser included offenses except a homicide case. For a form of instruction which may be used in homicide cases, see CALJIC [No.] 8.75." Similarly, Use Note to CALJIC No. 8.75 (Spring 2019 ed.) page 718 points out that the instruction "is designed for use in a homicide case. For a form of instruction which may be used in any other type of case, see CALJIC [No.] 17.12, Jury May Return Partial Verdict-Non-Homicide." Contrary to defendant's contention, the record does disclose why the court used CALJIC No. 17.12 instead of CALJIC No. 8.75. During the jury instruction conference, the court initially denied defendant's request for voluntary manslaughter instructions. However, after receiving emails from counsel, the court changed its decision and informed counsel it would give the jury voluntary manslaughter instructions. The court further informed the parties it would use CALJIC No. 17.12, instead of CALJIC No. 8.75, because the language in the instructions was "essentially" the same. Despite defendant's arguments to the contrary, we see nothing in CALJIC No. 17.12, when considered with the other instructions and the verdict forms given to the jury, that would confuse the jury regarding their duty to agree unanimously on the degree of murder.

Third, we reject defendant's contention that the court's use of the 1996 version of CALJIC No. 8.71 "created further confusion" regarding the distinctions between first-

degree murder and second-degree murder. The 1996 version of CALJIC No. 8.71, which was given in this case, informed the jury: "If you are convinced beyond a reasonable doubt and unanimously agree that the crime of murder has been committed by the defendant, but you unanimously agree that you have a reasonable doubt whether the murder was of the first or second degree, you must give the defendant the benefit of that doubt and return a verdict fixing the murder as of the second degree." In support of his claim of error, defendant asks us to consider the Supreme Court's decision in *People v. Moore* (2011) 51 Cal.4th 386 (*Moore*), in which the court opined that the "better practice" was not to use the 1996 version of CALJIC No. 8.71 on the ground that the instruction carried "at least some potential for confusing jurors about the role of their individual judgments (as opposed to the jurors' collective judgment) in deciding between first and second degree murder." (*Moore*, *supra*, at p. 411.)

However, since *Moore* was decided our Supreme Court has had several occasions to address the 1996 version of CALJIC No. 8.71, which was given in this case. (See *Rivera, supra*, 7 Cal.5th at pp. 325–327; *People v. Buenrostro* (2018) 6 Cal.5th 367, 428–430 (*Buenrostro*); *People v. Gomez* (2018) 6 Cal.5th 243, 301–302 (*Gomez*); *People v. Salazar* (2016) 63 Cal.4th 214, 246–248 (*Salazar*).) In all of the cases, the Supreme Court found that the use of CALJIC No. 8.71 did not constitute reversible error when the instruction was viewed in light of the other instructions given in those cases. (See *Rivera, supra*, at pp. 326–327; *Buenrostro*, *supra*, at pp. 428–430; *Gomez*, *supra*, at p. 302; *Salazar*, *supra*, at pp. 246–248.) For example, in *Buenrostro*, the court explained that, when "[v]iewing the jury instructions as a whole, as we must ([*People v. Huggins* (2006) 38 Cal.4th 175, 194 (*Huggins*)], we conclude the jurors would have understood that they must be individually convinced of defendant's guilt beyond a reasonable doubt before convicting her of first degree murder. (See CALJIC Nos. 8.74 [requiring a jury to unanimously agree on the degree of murder before returning a murder verdict]; 17.40 [requiring a juror to make an individual decision and not decide a question by merely following the majority vote], 17.43 [directing the jury to address any question during deliberation to the trial court], and 8.30 [instructing the jury that unpremeditated second

degree murder was an intentional unlawful killing with malice aforethought 'but the evidence is insufficient to prove deliberation and premeditation'].) Any jurors who might personally have been persuaded to give defendant the benefit of the doubt regarding the degree of murder when other jurors had concluded she was guilty of first degree murder would have understood that they could *not* properly vote to convict her of first degree murder because, in their view, the prosecution had not proven her guilt of that offense beyond a reasonable doubt. [Citations.] In the scenario defendant envisions, a jury's reasonable understanding of the instructions as a whole would result in a hung jury, not a directed verdict for first degree murder, as she appears to argue." (*Buenrostro, supra*, at pp. 429–430.)

We recognize that in the above cited Supreme Court cases concerning the use of CALJIC No. 8.71, the jurors in those cases were apparently instructed with only that portion of CALJIC No. 8.74 advising them of their duty to agree unanimously on the degree of murder, and not the additional language regarding any agreement on a "theory of guilt," which is at issue here. (See *Rivera, supra*, 7 Cal.5th at p. 326; *Buenrostro, supra*, 6 Cal.5th at p. 430 & fn. 27; *Gomez, supra*, 6 Cal.5th at p. 302; *Salazar, supra*, 63 Cal.4th at p. 247.) Accordingly, the Supreme Court did not consider whether CALJIC No. 8.74's "theory of guilt" language would cause the jurors to believe they did not have to unanimously agree on the degree of murder, when that language was considered in juxtaposition to CALJIC No. 8.71 and CALJIC No. 8.74. Nevertheless, the Supreme Court's recent decisions addressing CALJIC No. 8.71 are instructive in addressing defendant's contention regarding CALJIC No. 8.74.

Defendant initially argues that "viewed in the context of instructions given as a whole, the 1996 version of CALJIC No. 8.71 improperly told jurors that if they unanimously found the crime of murder had been committed, they were *required* to return a verdict of first degree murder unless *every* juror found there was a reasonable doubt as to whether the murder was of the first or of the second degree. Thus, the language suggests first degree murder is the default verdict." However, defendant's argument regarding any problematic language in the 1996 version of CALJIC No. 8.71

has been soundly rejected by our Supreme Court's recent decisions on the issue as we have explained. (See, e.g., *Mitchell, supra,* 2019 Cal. Lexis 4610 at p. *38 [court found no merit to defendant's argument of possible source of confusion in 1996 version of CALJIC No. 8.71 suggesting first degree murder as default verdict as "CALJIC No. 8.74 more specifically addressed whether the jury is to treat first degree murder as the default finding; it explained that the jury must be unanimous in deciding whether the defendant is guilty of first degree murder, second degree murder, or manslaughter, with no default among them"].) Nonetheless, defendant further posits, "Critically, [the 1996 version of CALJIC No. 8.71] leaves one pivotal question unanswered: What the jury should do in the event it could not reach unanimous agreement on the degree of murder. In consulting other instructions given here, jurors would have found their answer in CALJIC No. 8.74, informing them they need not agree on the theory of guilt. Thus, the instructions taken together told the jurors that unanimity was not required as to the degree of murder." We disagree. In the scenario that defendant describes, where the jurors could not reach a unanimous decision on the degree of murder, the jurors' "reasonable understanding of the instructions as a whole would result in a hung jury, not a directed verdict for first degree murder, as [he] appears to argue." (*Buenrostro, supra,* 6 Cal.5th at p. 430.)

For all the reasons we have stated, we conclude defendant's claim of instructional error fails. CALJIC No. 8.74 was a correct statement of the law applicable to this case, and "there is no reasonable likelihood" that the instruction "caused the jury to misunderstand its duties in a manner that denied defendant his due process rights." (*Huggins*, *supra*, 38 Cal.4th at p. 193.)

III. Cumulative Error

Defendant argues he was deprived of a fair trial by the cumulative effective of his trial counsel's omissions and the trial court's instructional errors. He repeats his complaints about his trial counsel's failures, and also contends that compounding his trial counsel's purportedly deficient performance, were "a series of instructional errors that together, resulted in a directed verdict on first degree murder."

We see no merit to defendant's request for reversal based on cumulative error. "[A] series of trial errors, though independently harmless, may in some circumstances rise by accretion to the level of reversible and prejudicial error." (*People v. Hill* (1998) 17 Cal.4th 800, 844.). Here, we found no merit to the claims of ineffective assistance of trial counsel and the claims of instructional error were either harmless or without merit. Accordingly, there is nothing to cumulatively review.

DISPOSITION

The judgment is affirmed.

_____
Petrou, J.

WE CONCUR:

_____
Siggins, P.J.

_____
Wiseman, J.*

A151707/People v. Omar

* Retired Associate Judge of the Court of Appeal, Fifth Appellate District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.